



Villamanta Disability
Rights Legal Service Inc.

Villamanta Disability Rights Legal Service Inc.

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Duty of Care and Negligence

What is this fact sheet about?

This fact sheet is about responsibilities. The responsibilities other people have to you, and the responsibilities you have.

We all have a responsibility to be careful not to harm other people by the things we do. Some examples of these include:

- We have speed limits when driving a car so we don't cause an accident or hit someone
- Most medications can only be sold by a pharmacist so we know it is the right thing
- We have to put fences around our swimming pools so children don't fall in

These responsibilities have a special meaning in situations where one person has more power than another person, or more knowledge than the other. Some examples of these relationships include doctors, teachers, support workers, and dentists. These workers need to take particular care to avoid harm because they have a duty of care.

What is Duty of Care?

The law says that if it is *reasonably foreseeable* that you might suffer some sort of harm or loss because of something someone else does, then that person owes you a *duty of care*. This duty of care only applies in areas where you rely on them. For example, a doctor would owe you a duty of care to make sure that they give you proper medical attention, but would not owe you a duty of care in other areas like taking care of your finances.

What is Negligence?

Negligence is when someone owes you a duty of care, but has failed to act according to a reasonable standard of care and this has caused you injury. You cannot take legal action against someone for being negligent unless you suffer some harm or loss as a result.

What is standard of care?

The standard of care is the level of care they should take to meet their duty of care. While this depends on the situation, there are a few guidelines which must always be followed.

A person must act as a *reasonable person* of the same skills would in the same situation. For example, a support worker is expected to have more skills and training than a friend or untrained family member, and is expected to use these skills in doing their work.

Exactly what this reasonable person would have done is something which the court decides. When looking at what the reasonable person would have done, the court will look at certain things, including:

Important Note - This Information Sheet has been produced only for use in Victoria, Australia. Some of the laws mentioned in this Information Sheet will be different in other places.

- The risk of harm occurring and the possible seriousness of that harm;
- The difficulty of removing or reducing the risk; and
- The 'usefulness' of the activity

So if there is a high risk of injury, then the reasonable person would certainly do something to remove or reduce this risk to meet their standard of care. For example if there is a swimming pool without a fence, a reasonable person would make sure small children are not unattended in that area.

But if there is a small chance of injury, and the injury might be minor, the reasonable person might do nothing at all, and this would be acceptable. For example, when we prepare dinner, we use knives. There is always a risk we could cut ourselves accidentally, but we simply try to be careful.

It is also important to consider the usefulness of an activity. This is like the example with the kitchen knife. The benefit of cooking dinner is greater than the risk of cutting our finger.

What can I do if someone who owes me a duty of care is not being careful?

You can point out to them that you don't believe that they are doing the right thing, and that if you believe they have a responsibility to protect you from harm. If you don't feel that you want to talk with them directly, their employer should have a complaints procedure which you can follow. Or you might like to talk with an advocacy group, a Community Legal Centre or Villamanta about what your options are.

If I do suffer some harm or loss as a result of someone else's carelessness, what can I do about it?

You can sue the person for negligence and try to get some compensation for the harm or loss that you have suffered. It is important to know that, sometimes even if you are injured, the court might say that nobody was legally at fault for this because they did everything needed to satisfy their standard of care. If you are injured by someone else's mistake, the court might sometimes find that this mistake was reasonable and that they did not breach their standard of care. People do make mistakes, and these are allowed so long as they are reasonable mistakes.

Because these things can be complicated, it is very important you get a lawyer to help you if you are considering whether to sue someone for negligence.

What would I have to prove to win a negligence case in court?

You would have to show three things:

1. That the person owed you a duty of care;
2. That the person did something or failed to do something that a reasonable person in the same circumstances wouldn't have done;
3. That you suffered some harm or loss because of what the person did or didn't do.

If you are considering suing for personal injury, you may need to have your injury assessed by a doctor before you think about going to court. The doctor will need to establish what level of impairment your injury has resulted in because you cannot get compensation for any injuries unless you have a certain level of impairment.

Are these things difficult to prove in court?

Sometimes they can be. Often the most difficult thing to show is what would be considered reasonable in the circumstances. People can have very different ideas about what is reasonable, and if you are suing someone for negligence, they will often try to argue that the

things which they did were, in the circumstances, reasonable.

They may also try to prove that you also contributed to the harm and loss you suffered because of something you did or didn't do.

How does the court decide who is right?

In trying to decide who is right and who is wrong on these sorts of issues, the court will take a range of things into account, such as:

- Decisions that other courts have made on the same sorts of issues
- Professional standards that might apply in the situation
- Laws that might give an indication of what is expected in the circumstances
- The court's view of what the ordinary person in the community is likely to think about what is reasonable in the circumstances.

It is important to get legal advice if you are thinking about suing someone for negligence.

When someone owes me a duty of care, does this mean that they can stop me from doing anything which they think is dangerous?

In most cases no. Unless you have a guardian, you can make your own decisions about what you do and don't do.

If someone owes you a duty of care, they are supposed to be responsible for their own actions and do whatever is reasonable to stop you from being injured or harmed. This does not mean that they can tell you what you should or shouldn't do.

If someone is providing an activity, and it involves some danger, it will generally be their responsibility to point out the dangers to you, and to show you ways of being safe. For example, the rides at the Show can be dangerous, and people are not allowed on them unless they are a certain height, or if they have certain conditions. The staff at the rides will then put your safety harness on before the ride starts, and tell you to keep your arms inside. You retain the right to make a decision about whether you want to go on that ride. Is it safe for you? Is the fun of the ride worth the risk of getting hurt, or scared?

When you know about the risks involved, if you still choose to go ahead with those risks, no one can really stop you without legal authority to do so. Having a duty of care is not in itself enough to give a person legal authority to stop you from doing the things that you want to do. People cannot break the law to fulfil their duty of care.

If you did something that increased your risk of suffering loss or harm, and a reasonable person would not have engaged in that conduct, then you may not be able to claim as much, or any compensation if you are injured as a result. In the example above, if you ignored the signs about people with heart problems going on the ride, or if you put your arms out even though you were told not to, and you were injured, the Show will argue that that was your fault, and not theirs.

But what if a support worker thinks that I cannot understand the dangers facing me?

This decision is not really for them to make. The law says that you can make your own decisions, unless the Guardianship and Administration Board or a Court has said that you are unable to make those decisions for yourself. If a support worker thinks that you cannot understand the risks and dangers of a particular situation, it is their responsibility to try to help you understand those risks, and to minimise those dangers, in a way that does not involve taking away your normal rights and freedoms.

When might someone have legal authority to stop me from doing something that I want to do, but which is dangerous?

A person could have legal authority to stop you from doing something dangerous if they are your legal guardian, if you have had an order made against you under certain Acts, or in the case of an emergency.

Do I owe a duty of care to anyone?

Yes. If your actions are reasonably likely to affect someone else, then you owe them a duty of care. This means that you have to take reasonable care to ensure that those people are not harmed or injured as a result of the things you do.

Does the service or support worker have a responsibility to help me to meet my duty of care to others?

Yes, if it is reasonable for this to be part of the support you should be getting. Sometimes it will be reasonable for you to take full responsibility for yourself. At other times the service will share some of the responsibility with you. For example, the service might have a responsibility to show you how to use a new piece of equipment, such as an electric wheelchair, in a way that does not injure others. You will still have a duty to use the chair carefully, but the service has a duty to help you learn how to do this.

How does the service balance the duty of care it owes me with my rights or the rights of others?

There are a wide range of factors service providers need to take into account when there are questions of rights and responsibilities. It can be hard to recognise everyone's rights at the same time, and sometimes people will choose the safest option because it reduces the risk for everyone.

If that is not your preferred option, you should consider seeking some advice about:

- Whether you want assistance negotiating with the provider;
- Whether you are using the right service for you right now;
- What you can do to resolve this situation or change providers.

If your rights, or the rights of others are to be interfered with, service providers should ensure there is due process. You should be involved in any decision which affects you personally. You can make a complaint about a decision to the Disability Services Commissioner or ask the Victorian Civil and Administrative Tribunal (VCAT) to review some decisions.

What are some of the more common ways in which services try to ensure people's safety, using unlawful methods?

These include such things as:

- Locking doors to stop people from wandering out
- Giving people too much medication, so they are always sedated
- Punishing people by not letting them have access to their own money or property or threatening to evict people if they do not 'behave'.

All of these are unlawful, and services have a responsibility to find other ways of ensuring people's safety - ways which do not involve an infringement of your human and legal rights.

If you believe a service is being unlawful in the way it is treating you or someone else, or you believe it is failing in its standard of care, contact any of the organisations listed below.

Some useful numbers:

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| <p>Villamanta Disability Rights Legal Service Inc. Phone: 1800 014 111 www.villamanta.org.au/</p> | <p>Disability Services Commissioner Phone: 1800 677 342 www.odsc.vic.gov.au/</p> |
| <p>Office of the Public Advocate Phone: 1300 309 337 www.publicadvocate.vic.gov.au/</p> | <p>National Disability Services Abuse Hotline Phone: 1800 880 052 www.disabilityhotline.net.au/</p> |